

# SEARCH OF A MOTOR VEHICLE INCIDENT TO A TRAFFIC ARREST: THE OUTLOOK AFTER *ROBINSON* AND *GUSTAFSON*

## I. INTRODUCTION

In the companion cases of *United States v. Robinson*,<sup>1</sup> and *Gustafson v. Florida*,<sup>2</sup> the United States Supreme Court held that a full field search of the person of an arrestee may be made incident to an arrest for a traffic violation even if the arresting officer had no reason to believe that the arrestee was armed, or even if in fact the police officer believed that the offender was not armed.<sup>3</sup>

Left unanswered by the Court was the question whether a search without probable cause of the arrestee's vehicle could be justified as incident to an arrest for a minor traffic offense. Among the first state appellate courts to consider the question, after the decisions in *Robinson* and *Gustafson* were handed down, were the appellate court of Illinois, First District, the Supreme Court of Indiana, and the Texas Court of Criminal Appeals. In *People v. Cannon*<sup>4</sup> and *Frasier v. State*<sup>5</sup> the first two courts held that a search of the vehicle was authorized by the decisions in *Robinson* and *Gustafson*.<sup>6</sup> In *Wilson v. State*,<sup>7</sup> the Texas Court of Criminal Appeals, over a vigorous dissent by Judge Douglas, held that *Robinson* and *Gustafson* did not justify a search of the vehicle of a traffic offender.<sup>8</sup>

Unfortunately, none of the three courts saw fit to explain why it felt that *Robinson* and *Gustafson* did or did not extend to searches of the arrestee's vehicle. Both the Supreme Court of Indiana and the Texas Court of Criminal Appeals limited themselves to mere declarations of the applicability of *Robinson* and *Gustafson*.<sup>9</sup> While *Cannon* did suggest that an extension of the two cases to a search of the vehicle of the arrestee was made necessary by the need to protect the

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<sup>1</sup> 414 U.S. 218 (1973).

<sup>2</sup> 414 U.S. 260 (1973).

<sup>3</sup> 414 U.S. at 241 (Marshall, J., dissenting).

<sup>4</sup> 18 Ill. App. 3d 781, 310 N.E.2d 673 (1974).

<sup>5</sup> \_\_\_\_ Ind. \_\_\_\_, 312 N.E.2d 77 (1974).

<sup>6</sup> 18 Ill. App. 3d at 784, 310 N.E.2d at 376; \_\_\_\_ Ind. at \_\_\_\_, 312 N.E.2d at 80. The Indiana decision drew a sharp dissent from Justice De Breuler.

<sup>7</sup> 511 S.W.2d 531 (Tex. Crim. App. 1974).

<sup>8</sup> *Id.* at 533.

<sup>9</sup> "We do not decide whether there was probable cause for the police officer to search the vehicle for the reason we decide this issue pursuant to *Gustafson v. Florida*." \_\_\_\_ Ind. at \_\_\_\_, 312 N.E.2d at 80. "We do not find the recent holding of the United States Supreme Court in *Gustafson v. Florida* . . . to be applicable to the facts in the instant case." 511 S.W.2d at 533 n.1.

safety of the arresting officer, the court failed to elaborate on its basic position.<sup>10</sup>

The issue of whether a search of an automobile may be made incident to a traffic arrest is not a new one. The appellate courts of virtually every state, as well as many of the federal courts of appeal, have ruled on the question.<sup>11</sup> While many of the earlier decisions on the subject allowed a search of the vehicle, the more modern decisions in the area definitively rejected allowing a search of the vehicle based solely on a traffic arrest. It is the thesis of this note that even though the rationales underlying *Robinson* and *Gustafson* are quite reminiscent of the reasoning in many of the early state cases allowing a search of an automobile incident to a traffic arrest, a search of the person of the arrestee is still distinguishable from a search of his vehicle. The note will also explore the question whether, given the present alignment on the Supreme Court, the Court is likely to draw such a distinction. Finally, some of the dangers inherent in extending the scope of a search incident to a traffic arrest to the offender's vehicle will be discussed.

## II. THE EARLY CASES

Before 1960 most courts which considered the question whether it was permissible for police officers to search the vehicle of a person arrested for a minor traffic offense usually found the searches to be valid. In general, the cases took an extremely mechanistic approach to the matter<sup>12</sup> applying the following rationale: if the traffic arrest was valid, and the search was "incident" in time and place to the traffic arrest, then the search was valid.<sup>13</sup>

Another and to some extent more convincing rationale was later developed, mainly in dissenting opinions, when the tide began to turn against allowing searches incident to traffic arrests. This was the police protection rationale, *i.e.* that the search was justified by the necessity of protecting the safety of the arresting officers.<sup>14</sup>

The proponents of this view believed that the safety of the police

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<sup>10</sup> 18 Ill. App. 3d at 785, 310 N.E.2d at 676.

<sup>11</sup> E. FISHER, *SEARCH AND SEIZURE* 307-10 (1970). Annot., 10 A.L.R. 3d 314 (1966); Simeone, *Search and Seizure Incident to Traffic Violations*, 6 ST. LOUIS L.J. 506, 512 n.35 (1961); Comment, *Search Incident to Arrest and the Automobile*, 43 MISS. L.J. 196, 211 n. 64 (1972).

<sup>12</sup> Comment, *Search Incident to Arrest and the Automobile*, 43 MISS. L.J. 196, 210 (1972).

<sup>13</sup> *People v. Watkins*, 19 Ill. 2d 11, 18, 166 N.E.2d 433, 436 (1960); Simeone, *supra* note 11, at 512.

<sup>14</sup> *E.g.*, *Paxton v. State*, 255 Ind. 264, 278, 263 N.E.2d 636, 643 (1970) (Arterburn, J., dissenting), *State v. Meeks*, 467 S.W.2d 65, 69 (Mo. 1971) (Holman, J., dissenting), *Wilson v. State*, 511 S.W.2d 531, 535 (Tex. Crim. App. 1974) (Douglas, J., dissenting).

officer was an absolute value, and that any intrusion into an individual's right of privacy which occurred as a result of making a search incident to a traffic arrest had to be tolerated in light of the overriding goal of protecting the police officer. The case for allowing searches incident to traffic arrests was often stated in strongly emotional terms. As one supporter of the "right" to search incident to traffic arrests wrote:

If the [view that a traffic arrest does not automatically justify an incidental search of the vehicle] were adopted, who would be willing to tell the widow of the dead police officer that he was killed because a narrow view of the Constitution deprived him of one of the means he traditionally had for the purpose of protecting himself . . . But where the law has authorized arrest, the life of the arresting officer should be treated as being more sacred than the alleged right of the person lawfully arrested to be free from embarrassment, and the officer should be permitted the best method of protecting himself—the traditional right to search incident to a lawful arrest.<sup>15</sup>

While most of the state appellate courts allowed a search of the vehicle incident to a traffic arrest,<sup>16</sup> there was no unanimity on the permissible scope of such searches. Some courts allowed a "stem to stern" search of the automobile.<sup>17</sup> Other courts, particularly those relying on the police protection rationale, would limit the search to the passenger compartment of the vehicle, disallowing any search of the trunk on the grounds that the police officer could not possibly be in danger from a weapon hidden in that part of the vehicle.<sup>18</sup>

### III. THE MODERN CASES

A major break in the adherence of state and federal courts to a rule allowing a search of the vehicle and person of a traffic arrestee came in 1960 when the Supreme Court of Illinois handed down decisions in the companion cases of *People v. Watkins*<sup>19</sup> and *People v. Mayo*.<sup>20</sup> In *Watkins* the police sought to justify their search of the person of the driver of an automobile as incident to his arrest for parking too close to a crosswalk.<sup>21</sup> In *Mayo* the police claimed that

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<sup>15</sup> Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 St. Louis L.J. 17 n.18, 90 (1962).

<sup>16</sup> Simeone, *supra* note 11, at 512.

<sup>17</sup> *Watts v. State*, 196 So. 2d 79 (Miss. 1967).

<sup>18</sup> See *Brinegar v. State*, 97 Okl. Cr. 299, 262 P.2d 464 (1953); *McCurdy v. State*, 42 Ala. App. 646, 176 So. 2d 53 (1965).

<sup>19</sup> 19 Ill. 2d 11, 166 N.E.2d 433 (1960).

<sup>20</sup> 19 Ill. 2d 136, 166 N.E.2d 440 (1960).

<sup>21</sup> 19 Ill. 2d at 19, 166 N.E.2d at 437.

their search of the glove compartment of a vehicle was permissible as incident to the arrest of the driver on a charge of parking too far from the curb.<sup>22</sup>

The Illinois court rejected both contentions holding that absent special circumstances the mere fact of a traffic arrest justified neither a search of the person of the arrestee, nor a search of his vehicle.<sup>23</sup> As Justice Schaefer wrote:

The critical issue in each case must be whether the situation that confronted the officer justified the search. . . . A uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers. But such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution is designed to provide. . . . A search incident to arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of a crime. . . . But when no more is shown than a car was parked too close to a crosswalk or too far from a curb, the constitution does not permit a policeman to search the driver.<sup>24</sup>

An increasing number of state courts and numerous federal courts of appeal began to follow the lead of the Illinois Supreme Court, viewing searches based only upon a traffic arrest as constitutionally prohibited general exploratory searches.<sup>25</sup> In the process of creating a new rule, these state and federal courts also developed a much more sophisticated concept of "incidentalness." A search was no longer "incident" to an arrest merely because it was made at the same time and place as the arrest, but because it was in some way related to the primary purpose of the arrest.<sup>26</sup> The courts following the new trend, while not denying the desirability of protecting the police from physical assault, felt that the risk to police officers was minimal in minor traffic arrests (especially in cases where the circumstances gave the police no reason to believe that the suspect was armed) when compared with the potential invasion of fourth amendment rights.<sup>27</sup> As Judge Skelly Wright put it,

We are not unmindful of the tragic fact that in this country in the period between July 1, 1970 and June 30, 1971, 6 police officers died and 92 others were injured in the course of making traffic ar-

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<sup>22</sup> 19 Ill. 2d at 138, 166 N.E.2d at 441.

<sup>23</sup> 19 Ill. 2d at 19, 166 N.E.2d at 437; 19 Ill. 2d at 138, 166 N.E.2d at 441.

<sup>24</sup> 19 Ill. 2d at 18-19; 166 N.E.2d at 436-37.

<sup>25</sup> *State v. Meeks*, 467 S.W.2d 65, 66 (Mo. 1971).

rests. . . . These statistics, however, must be placed in proper perspective. Considering the millions of traffic arrests made annually, the fact remains that these arrests constitute possibly the safest of all law enforcement activities.<sup>28</sup>

By the late 1960's the clear weight of case authority had shifted toward not allowing searches incident to traffic arrests.<sup>29</sup> The view that a traffic arrest alone could not justify a search of the person or the vehicle of the arrestee had even filtered down to the level of law enforcement agencies.<sup>30</sup> However, now that *Watkins* and its progeny prohibiting searches of the person of the arrestee incident to a traffic arrest have been overruled by *Robinson* and *Gustafson*, at least insofar as they rested upon federal constitutional grounds,<sup>31</sup> the underlying rationales developed in those cases are now subject to serious doubt. There is little question that on the basis of *Robinson* and *Gustafson* a police officer may search the person of one he custodially arrests for a traffic violation.<sup>32</sup> Whether the scope of such a search may extend to the arrestee's vehicle is still an open question, particularly in light of the lack of a United States Supreme Court decision on the issue and the reluctance of state appellate courts to go beyond mere declarations of the applicability or non-applicability of *Robinson* and *Gustafson* to searches of the vehicle.

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<sup>28</sup> *Amador-Gonzalez v. United States*, 391 F.2d 308, 317 (5th Cir. 1968).

<sup>29</sup> *United States v. Robinson*, 471 F.2d 1082, 1096 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973).

<sup>30</sup> *Id.* at 1097 n.22.

<sup>31</sup> B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 392 (1973).

<sup>32</sup> U.S. DEPARTMENT OF JUSTICE, MANUAL ON THE LAW OF SEARCH AND SEIZURE 42 (1972).

<sup>31</sup> Of course, a state appellate court remains free to interpret its own state constitutional provisions in such a way as to preclude a search of the person of a traffic arrestee, or his vehicle. This was done by the Supreme Court of Hawaii in the case of *State v. Kaluna*, \_\_\_ Haw. \_\_\_, 520 P.2d 51 (1974). Another means of attack on the search would be to challenge the validity of the underlying arrest since if the arrest is an illegal seizure of the person, any fruits of the arrest, including anything found in the course of an incidental search, is inadmissible as evidence. *Wong Sun v. United States*, 371 U.S. 471 (1963). Justice Stewart, in his concurring opinion in *Gustafson*, suggested that it might be a violation of fourteenth amendment due process for the police to make a custodial arrest for a minor traffic violation. 414 U.S. at 266-67. In the case of *People v. Copland*, 77 Misc. 2d 649, 354 N.Y.S.2d 399 (Dist. Ct. Nassau Co. 1974), a New York court suppressed evidence found during the course of a search of the person of a traffic offender on the ground that the state legislature did not authorize the police to make custodial arrests in cases of minor traffic violations. The court did, however, go on to cite Justice Stewart's argument in *Gustafson* as an alternative basis for its holding.

<sup>32</sup> 1 J. VARON SEARCHES, SEIZURES AND IMMUNITIES (Addendum) 1-5 *passim* (1974).

#### IV. *Robinson* AND *Gustafson*: THEIR APPLICABILITY TO A SEARCH OF THE ARRESTEE'S VEHICLE

While it is true that the fact situations in *Robinson* and *Gustafson* involved only a search of the person of the arrestee,<sup>33</sup> the themes developed in the majority opinions in the two cases have great potential for undermining the rationales developed in the more modern decisions on search of the vehicle incident to a traffic arrest.<sup>34</sup> There were three opinions in *Robinson*: the majority opinion written by Justice Rehnquist, joined by Chief Justice Burger and Justices Blackmun, White and Stewart; a concurring opinion by Justice Powell; and a dissenting opinion written by Justice Marshall, joined by Justices Douglas and Brennan. The alignment of the Court was the same in *Gustafson* except for a brief concurring opinion by Justice Stewart.

The majority opinions in *Robinson* and *Gustafson* rest on two fundamental propositions. The first is that a full field search of a person custodially arrested for a traffic offense is "reasonable" because it is "incident" to the arrest.<sup>35</sup> As Justice Rehnquist wrote,

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. . . . The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained unchallenged until the present case.<sup>36</sup>

Justice Rehnquist went on to quote the following passage from *Agnello v. United States*:<sup>37</sup>

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape, is not to be doubted.<sup>38</sup>

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<sup>33</sup> 414 U.S. at 236; 414 U.S. at 266.

<sup>34</sup> One state appellate court, the Missouri supreme court, did draw a distinction between the search of the vehicle and the search of the person, forbidding the former, while allowing the latter. However the Missouri court seems to have drawn the distinction in the case of *State v. Meeks*, 467 S.W.2d 65 (Mo. 1971) more in an effort to avoid overruling a previous case, *State v. Moody*, 443 S.W.2d 802 (Mo. 1967), than in an effort to draw some sort of reasoned distinction since the reasons, put forth in *Meeks*, for prohibiting the incidental search of a traffic arrestee's vehicle have equal application to a search of his person.

<sup>35</sup> 414 U.S. at 224.

<sup>36</sup> *Id.*

<sup>37</sup> 269 U.S. 20 (1925).

<sup>38</sup> *Id.* at 30; 414 U.S. at 225.

The second fundamental proposition put forth in *Robinson* and *Gustafson* is a definitive rejection of the idea that the risks to the police officer in making a traffic arrest are so minimal as to make a search of the suspect's person unreasonable under the fourth amendment.<sup>39</sup> The Court not only rejected the contention that the dangers to the police officer were minimal, but went on to say that the Court would eschew any case-by-case consideration of the dangers to the police officer.<sup>40</sup> Hence, not only need there be no objective cause for the police officer to believe that the traffic arrestee is armed before searching his person, but even if the officer in fact *subjectively* believes that his prisoner is not carrying a concealed weapon on his person, as was the case in both *Robinson* and *Gustafson*,<sup>41</sup> he may still conduct a full field search of the person of the arrestee for a "weapon;" and any contraband or evidence of a crime found during the search may be used against the arrestee under the currently operative "windfall" rule.<sup>42</sup>

The kinship between the underlying themes in *Robinson* and *Gustafson* and the ideas developed in the early state cases on searches of the vehicle incident to a traffic arrest is readily apparent. The question is whether, given the two rationales, a search of the vehicle of the arrestee can be distinguished from a search of his person. If one adopts the purely mechanistic concept of "incidental-ity" seemingly embodied in *Robinson* and *Gustafson*, then there is little hope of distinguishing the two situations. At least one writer has suggested that *Robinson* and *Gustafson* stand for the proposition that once a custodial traffic arrest is made, there need be no underlying justification, *e.g.*, fear of the arrestee having a concealed weapon to warrant making a search of the person; the very fact of the arrest itself supplies the requisite justification.<sup>43</sup> Such a legal theory would, in essence, make the body of a person arrested for a traffic offense a "free-fire zone" where the probable cause requirements of the fourth amendment cease to apply. This zone of immunity from fourth amendment protections easily could be extended to the entire passen-

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<sup>39</sup> 414 U.S. at 234.

<sup>40</sup> *Id.* at 235; 414 U.S. at 266.

<sup>41</sup> 414 U.S. at 241 (Marshall, J., dissenting); 414 U.S. at 267 (Marshall, J., dissenting).

<sup>42</sup> Professor Anthony Amsterdam has suggested that the windfall rule be replaced by a rule which would allow into evidence only that for which the police are supposed to searching, *e.g.*, in a protective "stop and frisk" search the prosecution would be allowed to introduce into evidence any weapons found on the person of the defendant during the search, but not other evidence such as drugs. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 434, 437 (1974).

<sup>43</sup> Note, *U.S. v. Robinson—Scope Incident to Custodial Arrest for a Traffic Violation Defined*, 35 U. PITT. L. REV. 864, 875 (1974).

ger compartment of the automobile through the application of the rules developed in *Chimel v. California*,<sup>44</sup> i.e. the permissible scope of an incidental search may extend to the person of the arrestee and *the area within his immediate control*.<sup>45</sup> Indeed, this was exactly what was done by the court in *People v. Cannon*.<sup>46</sup>

However, there are some indications that the zone of immunity concept would command the votes of only four members of the Supreme Court: Chief Justice Burger, and Justices Rehnquist, White, and Blackmun. Justice Stewart, in his dissenting opinion in *United States v. Edwards*<sup>47</sup> expressed his concern that an incidental search bear some relation to the traditional justifications for this type of warrantless action.<sup>48</sup> As set out in Justice Stewart's frequently cited opinion in *Chimel v. California* these justifications are: (a) to remove any weapons that the arrestee might use in order to resist arrest or to attempt to make an escape, and (b) to remove any evidence of the crime from the control of the arrestee in order to prevent its destruction.<sup>49</sup> In a traffic arrest there is generally no evidence of the crime.<sup>50</sup> The only possible rationale for an incidental search in a traffic arrest situation is the protection of the police officer. This brings us to the second point made by the majority opinions in *Robinson* and *Gustafson*.

As mentioned previously, the majority in *Robinson* and *Gustafson* held that a full field search of the person of the arrestee was justified even though the arresting officers testified that they did not fear the possibility of the suspect having a concealed weapon.<sup>51</sup> It is also clear from the facts in the two cases that the Court sanctioned actions which went beyond those necessary to protect the officers from the threat of a concealed weapon. The Court's indulgence in judicial "overkill" (in the form of the refusal to assess the dangers to the police officer on a case-by-case basis, and its sanctioning of unnecessary protective measures) may be explained in terms of the

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<sup>44</sup> 395 U.S. 752 (1969).

<sup>45</sup> *Id.* at 763.

<sup>46</sup> 18 Ill. App. 3d at 784, 310 N.E.2d at 80. The "lunging reach" rule of *Chimel* probably would prohibit a search of the trunk of the automobile. See text accompanying note 63, *infra*. This proposition was recognized by Judge Douglas in his dissent in *Wilson*, 511 S.W.2d at 539 n.2.

<sup>47</sup> 415 U.S. 800.

<sup>48</sup> *Id.* at 810-11.

<sup>49</sup> 395 U.S. at 762-63.

<sup>50</sup> *Amador-Gonzalez v. United States*, 391 F.2d 308, 315 (5th Cir. 1968). An interesting exception occurs in the case of persons arrested for driving while intoxicated. Here it generally has been held that the police may search for open bottles of liquor. *Wellman v. United States*, 414 F.2d 263 (5th Cir. 1969).

<sup>51</sup> See text accompanying note 41 *supra*.



Court's perception of the dangers to police officers *in general* from weapons hidden on the persons of those they custodially arrest for traffic offenses. It is arguable that the gross dangers to the officer from weapons hidden in the arrestee's vehicle is much smaller, and hence, the overprotective approach adopted by the Court is not needed.

As Justice De Brueler pointed out in his dissent in *Frasier v. State*,<sup>53</sup> the situations in *Robinson* and *Gustafson* both involved "custodial" arrests, arrests in which the police officer took the suspect into custody and transported him to the local jail in his police car.<sup>54</sup> This particular type of arrest maximizes the danger from weapons hidden on the person of the arrestee, while minimizing the danger from weapons hidden in the arrestee's vehicle. Both the dissenting judge in the court of appeals decision of *United States v. Robinson*,<sup>55</sup> Judge Tamm, and the majority of the Supreme Court in its decision of *Robinson* recognized that there are two elements which, when combined, create a particularly volatile situation for the police officer making a custodial arrest. One is the very fact of confrontation between the police officer and the suspect.<sup>56</sup> The other, and in the case of a possible search of the vehicle the more relevant, is the prolonged period of contact between the officer and his prisoner.<sup>57</sup> This contact invariably takes place in the policeman's patrol car. While the suspect is in the police car, the police officer, especially if he is alone, is highly vulnerable to a sneak attack by the arrestee using a weapon concealed upon his person. In contrast, the danger to the police officer from a weapon hidden in the arrestee's automobile is nil since it would be impossible for the arrestee to reach a weapon secreted in his own vehicle while sitting in the arresting officer's police car.

Even in non-custodial arrest situations, there is considerable reason to believe that a search of a traffic arrestee's vehicle would be inefficacious in protecting the police officer from attack. As Professor Allen Bristow noted in his study of police officer shootings (a report cited with approval by Mr. Justice Rehnquist in his opinion in *Robinson*), there is a paucity of empirical studies on the dangers

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<sup>52</sup> In both cases, a frisk of the prisoners revealed cigarette packs. All that was necessary to protect the police officers from weapons hidden in the package was for the officers to keep the packs away from the arrestees. 414 U.S. at 256 (Marshall, J., dissenting). Instead, the Court allowed the officers to open the packages and examine the contents.

<sup>53</sup> \_\_\_\_ Ind. at \_\_\_\_, 312 N.E.2d at 84.

<sup>54</sup> 414 U.S. at 234-35; 414 U.S. at 265.

<sup>55</sup> 471 F.2d 1082, 1117 (D.C.Cir. 1972).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; 414 U.S. at 234-35.

to the police officer in the course of making traffic arrests.<sup>58</sup> However, the statistics compiled by Professor Bristow indicate that a majority of assaults on police officers making traffic arrests occur while the officer is still seated in his own vehicle, or while the officer is approaching the suspect's vehicle.<sup>59</sup> In a majority of cases, search of a traffic arrestee's vehicle will not prevent an assault on a police officer.

The tactics used by the police in confronting traffic violators also tend to minimize the utility of a vehicle search. The standard operating procedure of many police forces is to require the traffic offender to get out of his car when being arrested by the police officer, especially if the officer harbors some suspicion about the person or persons in the car.<sup>60</sup> This tactic of forcing the suspect or suspects to alight from the vehicle was used in the *Cannon*, *Frasier*, and *Wilson* cases.<sup>61</sup> Once the suspect is out of his car, the calculus of danger to the police officer is radically changed.<sup>62</sup> While the risk of an assault on the officer through the means of a weapon hidden on the person of the arrestee is arguably high, the risk of the arrestee using a weapon hidden in his vehicle is concomitantly low, for the result of any sudden movement by the arrestee toward his vehicle is likely to be the death or serious wounding of the suspect.

Once the suspect is out of his vehicle, constitutional limitations on the right of the arresting officer to search the vehicle may come into play. In *Chimel*, the Supreme Court limited the permissible scope of any search incident to a valid arrest to the person of the arrestee and the area within his immediate control.<sup>63</sup> While *Chimel*

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<sup>58</sup> Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. Crim. L. C. & P.S. 93 (1963), cited at 414 U.S. at 234 n. 5.

<sup>59</sup> *Id.*

<sup>60</sup> Some police manuals recommend that the police officer have the traffic offender remain in his vehicle. V. FOLLEY, *POLICE PATROL TECHNIQUES AND TACTICS* 95 (1973). *But see* N. CLOWERS, *PATROLMAN PATTERNS, PROBLEMS, AND PROCEDURES* 147 (1962). Whatever the best procedure may be, the fact remains that the practice of police ordering suspected traffic violators out of their vehicles remains widespread. *See* note 61, *infra*.

<sup>61</sup> 18 Ill. App. 3d at 784, 310 N.E.2d at 676; — Ind. at —, 312 N.E.2d at 79; 511 S.W.2d at 532.

<sup>62</sup> At least one court opposed to automatically allowing a search of the vehicle incident to a traffic arrest has, by way of dictum, suggested that when there is more than one person in the automobile, the police ought to be allowed to search it for weapons, even after the driver is removed. *Fields v. State*, 463 P.2d 1000, 1004 (Okla. Crim. App. 1970). The reasoning behind this position is that even though the driver is outside the vehicle, any weapon concealed in the vehicle is accessible to the passengers. While this rationale seems plausible, there is one major flaw; ordering all the occupants to alight from the vehicle is a precondition to any search of the vehicle. No sane police officer is going to attempt to make a search of a vehicle while it is still occupied. The procedure is simply too dangerous. Once the police officer removes the passengers in order to make the search, the danger which the Oklahoma court perceived disappears.

<sup>63</sup> 395 U.S. at 763.

itself dealt only with an incidental search of the arrestee's premises, most state courts which have considered the question have been willing to apply the scope limitations of *Chimel* to searches of automobiles.<sup>64</sup> When the suspect is out of his car, can any portion of the interior of the car be said to be within his immediate control? At least one court, the United States Court of Appeals for the Eighth Circuit has answered the question affirmatively, saying that as long as the suspect was within "leaping range" of the interior of the car, a police officer may conduct an incidental search of the automobile's interior.<sup>65</sup> The Oklahoma Court of Criminal Appeals has taken a more flexible approach. In *Fields v. State*<sup>66</sup> that court held that the question whether the interior of an automobile is within the driver's immediate control once he has exited from the car must be answered by considering the circumstances of each individual case.<sup>67</sup> An incidental search of the vehicle of a traffic offender could not be made if the police officer were securely restraining the arrestee (this presumably would be done in any custodial arrest of the type involved in *Robinson* and *Gustafson*), if the arrestee had left the vicinity of the automobile, or if the doors of the automobile were closed and the arrestee made no attempt to re-enter the vehicle.<sup>68</sup>

The Oklahoma court went even further in *Lawson v. State*,<sup>69</sup> implying that in all cases where the offender is removed from his vehicle, the interior of the vehicle is out of his reach. The court said:

Most certainly the officer is entitled to protect himself, but his actions must be consistent with this purpose. After both defendants were removed from the car, they were no longer able to employ any weapon that might have been inside the vehicle. Certainly the interior of the bag on the back floor of the car was beyond the arrestee's reach when they were outside the car.<sup>70</sup>

Even if a rule such as the one advocated by the Oklahoma Court of Criminal Appeals were universally adopted, the police could still circumvent it by making the actual "arrest" while the suspect was still seated in his automobile. The police could then validly claim that

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<sup>64</sup> Note, *The Effect of Chimel v. California on Automobile Search and Seizure*, 23 OKLA. L. REV. 447, 454 (1970); see cases listed at *Lawson v. State*, 484 P.2d 1337, 1340 n. 4, (Okla. Crim. App. 1971). *Accord*, *Commonwealth v. Cavanaugh*, \_\_\_\_ Mass. \_\_\_\_, 317 N.E.2d 480, 482 (1974). *Contra*, *State v. Carter*, 54 N.J. 436, 255 A.2d 746 (1969).

<sup>65</sup> Application of Kiser, 418 F.2d 1134 (8th Cir. 1969).

<sup>66</sup> 463 P.2d 1000 (Okla. Crim. App. 1970).

<sup>67</sup> *Id.* at 1004.

<sup>68</sup> *Id.*

<sup>69</sup> 484 P.2d 1337 (Okla. Crim. App. 1971).

<sup>70</sup> *Id.* at 1341.

the entire passenger compartment of the vehicle was within the arrestee's reach.<sup>71</sup>

Allowing the police to search the vehicle may well bring about the violent confrontation that an incidental search is designed to avert. The driver with something to hide might be willing to risk an assault upon an armed police officer if he were certain that his vehicle would be searched with the consequent discovery of whatever he was trying to conceal.

Moreover, it is difficult to imagine a situation in which a search of the vehicle incident to a traffic arrest would protect the police officer. Professor Burton Agata has suggested that the officer might be in danger from a weapon hidden in the car in the event that he allowed the suspect to drive his own car back to the courthouse for an appearance before a local magistrate.<sup>72</sup> Professor Agata failed to explain why the suspect would choose to attack an armed police officer in a location where help is likely to be readily at hand in preference to trying to make a "getaway" in the car he has at his immediate disposal.

Another possible scenario was put forth by Judge Douglas of the Texas Court of Criminal Appeals in his dissent in *Wilson*. He hypothesized that the police officer could conceivably be attacked with a weapon hidden in the arrestee's vehicle after the officer returned to the police car. According to Judge Douglas, the motivation for such an attack would be the arrestee's fear of being subjected to an identity check.<sup>73</sup> It is undoubtedly true that such a situation has occurred in the past.<sup>74</sup> However, two factors must be borne in mind. The first is that in the custodial type of arrest involved in *Robinson* and *Gustafson*, the suspect probably is going to be safely seated in the police car by the time the officer makes an on-the-scene identity check, if he ever makes one at all. The second is the availability of less intrusive alternative measures for the protection of the police officer, such as requiring the arrestee to remain outside his own vehicle or inside the police officer's automobile while the identity check is being made, or even a simple increase in vigilance on the part

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<sup>71</sup> Baker & Khourie, *Improbable Cause: The Poisonous Fruits of a Search After Arrest for a Traffic Violation*, 25 OKLA. L. REV. 54, 63 (1972). A leading police text on patrol tactics actually suggests that police officers use this technique. A. BRISTOW, *FIELD INTERROGATION* 95 (1964).

<sup>72</sup> Agata, *supra* note 15, at 24.

<sup>73</sup> 511 S.W.2d at 538.

<sup>74</sup> In fact, Professor Bristow lists the time while the police officer is talking on his radio as the third most dangerous period for an officer during a confrontation with a traffic offender. Bristow, *supra*, note 58.

of the police officer. If a search of the vehicle incident to a traffic arrest cannot be justified on the basis of protecting the police officer, as the above discussion seems to indicate, then it is completely divorced from the traditional underlying rationales for a warrantless search incident to an arrest. The absence of these underlying justifications may very well sway Justice Stewart to vote against allowing the police to search the vehicle of a person arrested for a traffic offense.

Even if Justice Stewart were to take a position against extending the scope of searches incident to a traffic arrest to the vehicle of the arrestee, that would still make only four justices voting against allowing these searches.<sup>75</sup> The fifth and deciding vote is likely to be cast by Justice Powell. Justice Powell in his concurring opinion in *Robinson* and *Gustafson* emphasized that when a person is arrested all other violations of the privacy of his person, such as a full field search, are unimportant by comparison. Yet Justice Powell specifically stated that, "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the *privacy of his person* [emphasis supplied]."<sup>76</sup> Justice Powell did not say that the individual loses his reasonable expectations of privacy in other areas, e.g., the inside of his automobile. The majority opinion in *Edwards v. United States*,<sup>77</sup> approvingly cited the following language from the United States Court of Appeals for the First Circuit's decision in *United States v. De Leo*:

While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.<sup>78</sup>

In contrast however, Justice Powell, in his concurring opinion in *Almeida-Sanchez v. United States*, did say that "[t]he search of an automobile is far less intrusive of the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court 'has long distinguished between the automobile and a home or office.'"<sup>79</sup> It does not necessarily follow from Justice Powell's analytical framework, placing the privacy of the automobile beneath the privacy of the person and the privacy of one's premises, that the interest in the privacy of the vehicle is not separable from that of the

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<sup>75</sup> Presumably, the three dissenters in *Robinson* and *Gustafson*, Marshall, Brennan, and Douglas, would oppose allowing incidental searches of the vehicle in cases of traffic arrests.

<sup>76</sup> 414 U.S. at 237.

<sup>77</sup> 415 U.S. 800 (1974).

<sup>78</sup> 422 F.2d 487, 493 (1st Cir. 1970), cited at 415 U.S. 808-09.

<sup>79</sup> 413 U.S. 266, 279 (1973).

person in the context of traffic arrests and therefore not deserving protection. First, the assaults on personal privacy, automatically and perhaps necessarily occasioned by arrest and incarceration,<sup>80</sup> have no effect on the arrestee's automobile *per se*. Second, given the lesser danger to the police officer from weapons hidden in the vehicle of the arrestee, as compared with weapons on the arrestee's person, it is possible to argue that the underlying societal interest mentioned in *De Leo*<sup>81</sup> which necessitates the indignities to the privacy of the person involved in an arrest, is not present in regard to a search of the traffic arrestee's vehicle.

Another factor which might influence Justice Powell to reject extending the search incident to a traffic arrest to the offender's vehicle is his insistence that the requirements of the "warrants clause" of the fourth amendment,<sup>82</sup> including the requirement of probable cause, be applied to all searches. As Justice Powell wrote in his opinion in *United States v. United States District Court*,

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific demands of the warrants clause. Some have argued that "[t]he relevant test is . . . whether a search was reasonable." This view, however, overlooks the second clause of the Amendment. The warrants clause of the Fourth Amendment is not dead language.<sup>83</sup>

Justice Powell may look askance at a warrantless search of a vehicle for weapons, without probable cause, especially if there is no automatic destruction of the occupant's expectation of privacy in the vehicle.

There is no way of telling with certainty which way Justice Powell will vote if the issue of search of the vehicle incident to a traffic arrest comes before the Court. All that can be predicted is that in any

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<sup>80</sup> An example of the supposedly socially necessary and automatic invasion of privacy of the arrestee is the generally recognized right of the police to inventory the clothing and personal effects an arrestee has with him at the time of his arrest. J. ISRAEL & W. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* 151 (1971). The incarcerated arrestee is subject to a vast number of horrible affronts, both official and unofficial, to his individual right of privacy of his person while he is in jail. See generally, J. MITFORD, *KIND AND USUAL PUNISHMENT* (1973).

<sup>81</sup> *DeLeo*, *supra*, at note 78.

<sup>82</sup> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>83</sup> 407 U.S. 297, 315 (1972). It is interesting to note that Justice Rehnquist, in his opinions in *Robinson* and *Gustafson*, ignores the requirements of the "warrants clause" completely, and assumes that the only standard by which a search incident to arrest is to be judged is that of "reasonableness." 414 U.S. at 235, 264.

Supreme Court test of the issue, Justice Powell is likely to continue his now familiar role in search and seizure questions as the key "swing" vote.<sup>84</sup>

#### V. DANGERS IN EXTENDING THE *Robinson/Gustafson* RATIONALE TO SEARCHES OF THE VEHICLE

There are many problems which arise when the police are allowed to make a full field search of the person of the arrestee incident to a custodial traffic arrest. The most perplexing legal problems to come to the fore because of the *Robinson/Gustafson* rule is how to handle claims of "pretextuous" arrests. A "pretextuous" or "timed" arrest is an arrest made for the sole purpose of conducting an incidental search. Empirical studies have shown that police officers have "more than occasionally" used traffic arrests as a pretext for making a search of the vehicle, particularly when they suspect that illegal drugs are concealed within the car.<sup>85</sup> The fruits of these pretextuous arrests have generally been subjected to the exclusionary rule.<sup>86</sup>

There are two possible ways of dealing with claims of pretextuous arrests. One is to look into the mind of the arresting officer. This approach has been rightly criticized as leading courts into a highly speculative realm. As Judge Wisdom noted in his opinion in *Amador-Gonzalez v. United States*, a far superior way of dealing with pretextuous arrests is to insist that the police have "search-type" probable cause in every search they undertake.<sup>87</sup> Now that the police no longer need "search-type" probable cause to conduct a full field search of a person custodially arrested for a traffic offense, reviewing courts must fall back on an examination of the police officer's subjective state of mind in order to determine if a pretextuous arrest was made.

In addition, several practical dangers may arise from the application of the *Robinson/Gustafson* rule. One of these is a vast increase in the number of custodial traffic arrests. Police officers are generally

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<sup>84</sup> An interesting illustration of the pivotal role played by Justice Powell in search and seizure cases is his position in the case of *Cardwell v. Lewis*, 417 U.S. 583 (1974). In that case the issue was whether a warrantless search and seizure of the automobile of an arrestee was justified in spite of the fact that the police had ample time to procure a warrant. The Court split 4 to 4 on the issue. However, the appellee's petition for a writ of habeas corpus was denied because Justice Powell voted with the four upholding the validity of the search on the grounds that such issues should not be raised in collateral federal habeas corpus proceedings. *Id.* at 596 (Powell, J., concurring). Justice Powell gave no indication of his views on the merits of the case.

<sup>85</sup> Heller, *A Conflict of Laws: Drug Possession and the Fourth Amendment*, 26 OKLA. L. REV. 317, 335-36 (1972).

<sup>86</sup> *McKnight v. United States*, 183 F.2d 977 (D.C.Cir. 1950).

<sup>87</sup> 391 F.2d 308, 315 (5th Cir. 1968).

given vast "on-the-street" discretion in dealing with traffic offenders.<sup>88</sup> They may (a) let the offender go with only a warning, (b) issue a summons or traffic ticket to the offender, or (c) make a full custodial arrest of the offender. At the moment, a custodial arrest is a condition precedent to an incidental search.<sup>89</sup> Rather than letting the offender go with just a warning or a summons, the police might now make a full custodial arrest in order to conduct an incidental search. Other problems arising from allowing searches incident to traffic arrests include the use of such searches as devices for harassing unpopular groups within a community, and the use of traffic arrests as a pretext for stopping and searching persons the police regard as suspicious.<sup>90</sup>

All the dangers that have been suggested as arising because of a rule allowing searches of the person incident to a traffic arrest apply with equal force to allowing searches of the vehicle. The automobile is still a protected zone of privacy under the fourth amendment. As Justice Stewart has said, "[t]he word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears."<sup>91</sup> To allow a warrantless search of the vehicle, without probable cause, would be to allow further invasions of the rights of privacy which the fourth amendment was designed to protect.

Allowing these searches would intensify all the problems connected with searches of the person incident to a traffic arrest. The prime deterrents to the police searching the person and the vehicle of every traffic offender they halt (aside from the exclusionary rule which would be lifted if the *Robinson/Gustafson* rule were to be extended to a search of the vehicle) is the time such actions would take, and the community hostility they would engender. Balanced against the constraints of time and ill-feeling on the part of the community is the possibility of finding evidence of a more serious crime, and being able to make a successful arrest of a suspect in that crime,

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<sup>88</sup> 414 U.S. at 248 (Marshall, J., dissenting).

<sup>89</sup> The Court specifically left the question whether a non-custodial arrest could justify an incidental search for another day. 414 U.S. at 236 n. 6.

<sup>90</sup> Suspicious person statutes, which allowed the police to arrest and thereby search and question those whom they deemed to be "acting suspiciously," are no longer constitutional. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1971). The same end can be achieved, however, through the use of traffic statutes, for it is virtually impossible for anyone to drive a car without violating one of the myriad of traffic regulations on the book of a particular jurisdiction. GEORGE, note 29 *supra*, at 384. For an interesting illustration of how traffic statutes can serve as substitutes for the now unconstitutional suspicious person laws, see *Hampton v. State*, 511 S.W.2d 1 (Tex. Crim. App. 1974).

<sup>91</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971).



thus fulfilling the institutional goal of the police force.<sup>92</sup> If the Court were to extend the permissible scope of a search incident to a custodial traffic arrest, then the chances of the police finding "something" which would lead to an arrest for a more serious offense would be proportionally increased, making it more worthwhile for the police to engage in such intrusions into privacy. The impact of this type of extension would be most noticeable among racial minorities and other unpopular groups, e.g., "penniless wanderers and hippie drivers."<sup>93</sup> Here, time is the only significant deterrent to continual police searches since community feelings are not only unlikely to be outraged by constant searches of these persons, but may well be soothed by this type of police action against groups considered undesirable.<sup>94</sup>

## VI. CONCLUSION

While the reasoning underlying *United States v. Robinson* and *Gustafson v. Florida* is in some ways a throw-back to the rationales behind many of the early state cases allowing a search of the vehicle incident to a traffic arrest, there are adequate grounds for distinguishing between a search of the person and a search of his vehicle. Whether the Court will choose to do so remains an open question. In any Supreme Court test on the matter, the votes of Justices Stewart and Powell are likely to be crucial. The three dissenters in *Robinson* and *Gustafson* must be able to "swing" both Justice Powell and Justice Stewart over to their side in order to prevent the scope of a search incident to a custodial traffic arrest from being extended from the person of the arrestee to his vehicle.

Harry S. Gerla

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<sup>92</sup> A former Los Angeles Deputy Police Commissioner described the view of the arrest as the "essence" of police work as follows:

[T]o the uniformed police officer who represents the backbone of the police force, the making of an arrest is the "guts" of "police work." The making of a "good" arrest is one of his most personally rewarding experiences. . . . He receives approval from his peers and sometimes official recognition from those who evaluate his performance and influence his professional future. He believes that the arrest of the guilty is the most effective method of deterring crime, protecting citizens, and providing a sense of security to the residents of the community.

J. FISK, *THE POLICE OFFICER'S EXERCISE OF DISCRETION IN THE DECISION TO ARREST: RELATIONSHIP TO ORGANIZATIONAL GOALS AND SOCIETAL VALUES* 24 (1974).

<sup>93</sup> *Lawson v. State*, 484 P.2d 1337, 1340 (Okla. Crim. App. 1971); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974).

<sup>94</sup> THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 188 (1967).